Supreme Court, U.S.
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No. 93-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RALPH RIVERA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The government asks this Court to ignore a constitutional violation on the ground that its prospective duration *may* be short and the issue thus potentially moot. In addition, the government minimizes what is a clear conflict between the Second and Tenth Circuits, as well as the First, Seventh and Ninth Circuits, in a vain attempt to create an appearance of uniformity among and within the circuits. Both arguments are flawed.[1]

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[1] Counsel for the Petitioner was appointed by the District Court pursuant to the Criminal Justice Act. *See* 18 U.S.C. § 3006A(d)(6).

I.

THE PETITION IS NOT MOOT

The government claims that this Court should not act because even if petitioner's constitutional rights have been violated, his trial will be over shortly thus mooting the important question before this Court. Despite the government's contentions, the issue is not moot. As this Court has repeatedly held, a case only becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *See Murphy* v. *Hunt*, 455 U.S. 478, 479 (1982) (quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)); *see also United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980). "Prospective mooting" is not, as the government must concede, a doctrine recognized by this Court.

Because the petitioner is still subject to pretrial detention and participating in an ongoing trial, the government's reliance on *Murphy* v. *Hunt* to support its mootness argument is misplaced. In *Murphy*, the petitioner sought to review the constitutionality of his pretrial detention after he was convicted at trial, an issue this Court determined was moot. *Id.* at 482-83. That is not this case.

Beyond this,it is a peculiar argument that this Court should ignore the deprivation of petitioner's constitutional rights on the grounds that it is likely to be over soon. Such a claim is based on pure speculation. A trial of this magnitude and complexity, involving over a dozen defendants and events occurring over a five year period, rarely moves as quickly as expected. Petitioner's trial, which may not be finished until June 1994, is no exception.

On April 6, 1994, petitioner will begin his thirty-second month in pretrial detention. His trial may last as long as

another two to three months beyond that date. The issue left open in *Salerno* is ripe for review now. This Court should not accept the government's argument that waiting a little longer will erase the constitutional deprivation. The government's claim that this constitutional deprivation is moot is likely to apply in almost every pretrial detention cases. Thus, according to the government, this Court should never address the issue left open in *Salerno* of when pretrial detention becomes so long as to violate due process.

II.

THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

The government claims that the Tenth Circuit's decision in *United States* v. *Theron*, 782 F.2d 1510 (10th Cir. 1986), does not create a conflict with the Second Circuit because *Theron* was based on a construction of the Speedy Trial Act, not the Due Process Clause, and because *Theron* preceded this Court's decision in *Salerno*. (Gov't Opp. at 12). In the Tenth Circuit, *Theron* is the controlling precedent on when the length of pretrial detention violates due process. Shortly before the filing of this petition, the Tenth Circuit released three detainees from pretrial detention lasting just over thirteen months. In each case, the Tenth Circuit based its decision on *Theron*. *See United States* v. *Aguirre*, No. 93-2271, 1993 WL 503181, at 2 (10th Cir. Dec. 8, 1993); *United States* v. *Denogean*, No. 93-2282, 1993 WL 483018, at 2 (10th Cir. Nov. 24, 1993); *United States* v. *Martinez*,

No. 93-2263, 1993 WL 483031, at 2 (10th Cir. Nov. 24, 1993).[2]

Thus, there is a circuit split because the Second Circuit has held that pretrial detention in excess of thirty-two months does not violate due process, *see United States* v. *Millan*, 4 F.2d 1038 (2d Cir. 1993), while the Tenth Circuit finds that detentions lasting ten months, (*United States* v. *Theron*), and thirteen months violate the due process clause. *See United States* v. *Aguirre*, No. 93-2271, 1993 WL 503181, (10th Cir. Dec. 8, 1993); *United States* v. *Denogean*, No. 93-2282, 1993 WL 483018 (10th Cir. Nov. 24, 1993); *United States* v. *Martinez*, No. 93-2263, 1993 WL 483031 (10th Cir. Nov. 24, 1993).

In those circuits that have addressed the issue of when pretrial detention becomes excessively prolonged, petitioner's detention would be found to violate due process in, at a minimum, three other circuits. *See United States* v. *Infelise*, 934 F.2d 103 (7th Cir. 1991) (holding that twenty-four months pretrial detention does not violate due process unless, as here, the prosecution is responsible for a significant portion of the delay); *United States* v. *Gelfuso*, 838 F.2d 358 (9th Cir. 1987) (holding that ten months pretrial detention does not violate due process where, unlike in this case, there is no showing of prosecutorial responsibility for the delay); *United States* v. *Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) (in denying petition for bail, holding that "in many, *perhaps most*, cases, sixteen months pretrial detention would be found

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[2] The government's claim that *Denogean* has no precedential value even in the Tenth Circuit is wrong. *See* Gov't Opp at 12, n.4. On November 29, 1993, the Tenth Circuit suspended 10th Cir. Rule 36.3. As a result, unpublished opinions now may be cited in the Tenth Circuit "if the opinion has persuasive value on a material issue." *See* General Order of November 29, 1993.

to exceed the due process limitations on the duration of pretrial confinement"; emphasis added).[3]

Here, Mr. Rivera's pretrial detention has stretched to over thirty-two months. Because of the April 1993 mistrial caused by the government's agents, the government must bear significant responsibility for over twelve months of that detention period or over one-third of the total.

CONCLUSION

The circuit conflict between the Tenth and Second Circuit is, contrary to the government's assertions, clear. And there is unresolved confusion among and within other circuits as well. *See* Pet. 9-11. This case presents the Court with an opportunity to answer the question left open in *Salerno* :when does pretrial detention become,as a matter of law, punitive and therefore violate due process. So long as

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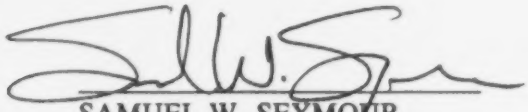
[3] The length of petitioner's pretrial detention may also violate due process in the Third and Eleventh Circuit as well. *See* Petition for Writ of Certiorari at 9-11.

this issue remains unanswered by the Court, there will continue to be variance and confusion among the circuits on this question-- precisely the circumstances warranting review by the Court.

Respectfully submitted,



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